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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PERIECE JOHNSON,) Case No. 08cv1782-W (BLM)
12)
13 Petitioner,) **REPORT AND RECOMMENDATION FOR**
14 v.) **ORDER GRANTING RESPONDENT'S**
15) **MOTION TO DISMISS**
16 MATTHEW CATE, Secretary of the)
17 California Department of)
18 Corrections and Rehabilitation,)
19)
20 Respondent.)
21 _____)

22 This Report and Recommendation is submitted to United States
23 District Judge Thomas J. Whelan pursuant to 28 U.S.C. § 636(b) and Local
24 Civil Rules 72.1(d) and HC.2 of the United States District Court for the
25 Southern District of California.

26 On September 29, 2008, Petitioner Periece Johnson, a state prisoner
27 appearing *pro se* and *in forma pauperis*, filed the Petition for Writ of
28 Habeas Corpus currently before the Court. Doc. No. 1. Petitioner
challenges his 2005 convictions for selling cocaine base and possessing
cocaine base for sale. Id.

This Court has considered the Petition, Respondent's Motion to
Dismiss, Petitioner's memorandum (which the Court construes as an
opposition to Respondent's motion to dismiss), and all supporting

1 documents submitted by the parties. For the reasons set forth below,
2 this Court **RECOMMENDS** that Respondent's Motion to Dismiss [Doc. No. 11]
3 be **GRANTED**.

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 On May 5, 2005, a San Diego jury convicted Petitioner of selling
6 cocaine base in violation of California Health and Safety Code
7 § 11352(a) and of possessing cocaine base for sale in violation of
8 Health and Safety Code § 11351.5. Lodgment 1 at 82-83. The next day,
9 Petitioner admitted having three prior felony convictions, a prior
10 strike conviction, and a prison prior. Id. at 135; Lodgment 2, vol. 4
11 at 287-98. The trial judge sentenced Petitioner to twenty-five years to
12 life in prison plus one additional year for his prior convictions
13 pursuant to California Penal Code § 667.5(b). Lodgment 2, vol. 5 at
14 365.

15 Petitioner appealed. Lodgment 3. In an unpublished disposition
16 dated July 25, 2006, the California Court of Appeal, Fourth Appellate
17 District, Division One affirmed the judgment. Lodgment 5. Thereafter,
18 Petitioner sought review by the California Supreme Court. Lodgment 6.
19 On October 11, 2006, the California Supreme Court denied the petition
20 for review. Lodgment 7.

21 On September 28, 2007, Petitioner filed a petition for writ of
22 habeas corpus in the California Supreme Court alleging claims of
23 (1) prosecutorial misconduct, (2) ineffective assistance of counsel, and
24 (3) miscarriage of justice. Lodgment 8. The California Supreme Court
25 denied the petition on March 19, 2008. Lodgment 9.

26 Petitioner filed his federal habeas petition on September 29, 2008.
27 Doc. No. 1. The instant Petition appears to raise the same three claims
28 presented to the California Supreme Court on habeas review. Id.

1 SCOPE OF REVIEW

2 Title 28, United States Code, § 2254(a), sets forth the following
3 scope of review for federal habeas corpus claims:

4 The Supreme Court, a Justice thereof, a circuit judge, or a
5 district court shall entertain an application for a writ of
6 habeas corpus in behalf of a person in custody pursuant to the
7 judgment of a State court only on the ground that he is in
8 custody in violation of the Constitution or laws or treaties
9 of the United States.

10 28 U.S.C. § 2254(a) (West 2006).

11 DISCUSSION

12 Respondent contends that the Petition should be dismissed because
13 it is barred by the one-year statute of limitations. Resp't Mem. at 3.

14 **A. The AEDPA's Statute of Limitations**

15 The Antiterrorism and Effective Death Penalty Act of 1996
16 ("AEDPA"), effective April 24, 1996, imposes a one-year statute of
17 limitations on federal petitions for writ of habeas corpus filed by
18 state prisoners. 28 U.S.C. § 2244(d) (West Supp. 2006). The one-year
19 limitations period runs from the latest of:

20 (A) the date on which the judgment became final by the
21 conclusion of direct review or the expiration of the time for
22 seeking such review;

23 (B) the date on which the impediment to filing an application
24 created by State action in violation of the Constitution or
25 laws of the United States is removed, if the applicant was
26 prevented from filing by such State action;

27 (C) the date on which the constitutional right asserted was
28 initially recognized by the Supreme Court, if the right has
been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or
claims presented could have been discovered through the
exercise of due diligence.

Id. § 2244(d)(1)(A)-(D).

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1 Here, the statute of limitations began to run on "the date on which
2 the judgment became final by the conclusion of direct review or the
3 expiration of the time for seeking such review." Id. § 2241(d)(1)(A).
4 The California Supreme Court denied Petitioner's petition for review on
5 direct appeal on October 11, 2006. Lodgment 7. The statute of
6 limitations thus began to run ninety days later on January 9, 2007,
7 after the time expired during which Petitioner could have filed a
8 petition for writ of certiorari in the United States Supreme Court.
9 Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (confirming that
10 limitations period does not begin until after expiration of ninety-day
11 period for seeking certiorari under Sup. Ct. R. 13). Absent tolling,
12 the AEDPA limitations period expired one year later on January 9, 2008.
13 28 U.S.C. § 2244(d). Because Petitioner did not file his federal habeas
14 petition until September 29, 2008, it is untimely unless Petitioner is
15 entitled to some form of tolling.

16 **B. Tolling**

17 **1. Petitioner Is Entitled to Statutory Tolling**

18 The AEDPA tolls its one-year limitations period for the "time
19 during which a properly filed application for State post-conviction or
20 other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2); Nino
21 v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). The statute of
22 limitations is not tolled, however, "from the time a final decision is
23 issued on direct state appeal [to] the time the first state collateral
24 challenge is filed." Nino, 183 F.3d at 1006. Similarly, the
25 limitations period is not tolled after state post-conviction proceedings
26 are final and before federal habeas proceedings are initiated. See 28
27 U.S.C. § 2244(d)(2).

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1 In this case, Petitioner is entitled to some statutory tolling.
2 The statute of limitations began to run on January 9, 2007. It stopped
3 when Petitioner filed a habeas petition in the California Supreme Court,
4 see 28 U.S.C. § 2244(d)(2) and Nino, 183 F.3d at 1006, though there is
5 some confusion as to the appropriate constructive filing date of that
6 petition. In determining the filing date of a petition, a petitioner
7 generally is entitled to the benefit of the "mailbox rule," which
8 dictates that the statutory filing date is the date the petition was
9 presented to prison authorities for mailing to the court. See Houston
10 v. Lack, 487 U.S. 266, 276 (1988) (holding that petitioner's notice of
11 appeal is deemed "filed at the time [he] deliver[s] it to the prison
12 authorities for forwarding to the court clerk"); Huizar v. Carey, 273
13 F.3d 1220, 1223 (9th Cir. 2001) (recognizing the application of
14 Houston's mailbox rule to federal habeas filings); see also Stillman v.
15 LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (recognizing same with
16 regard to state habeas petitions). Here, the proof of service attached
17 to Petitioner's state habeas petition indicates that he placed it in the
18 prison's internal mailing system on July 22, 2007, for mailing to the
19 California Supreme Court. Lodgment 8. On its face, the same habeas
20 petition contains a July 27, 2007 received stamp from the clerk of the
21 California Supreme Court. Id. However, Petitioner did not sign the
22 habeas petition itself until August 9, 2007. Id. Furthermore, the
23 habeas petition was not *filed* in the California Supreme Court until
24 September 28, 2007. Id. Petitioner claims he gave the petition to
25 prison guards on July 22, 2007, but that, due to mail room problems, the
26 petition went back and forth between he and the guards and was not
27 actually sent out until August 9, 2007. Pet'r Opp'n at 2. Ultimately,
28 the Court need not resolve this factual dispute because even if the

1 Court uses the earliest possible date of July 22, 2007 (which would
2 result in the statutory clock having stopped after 194 days),
3 Petitioner's federal petition still is untimely.

4 The statutory clock resumed running on March 19, 2008, when the
5 California Supreme Court denied Petitioner's habeas petition. See 28
6 U.S.C. § 2244(d)(2). It then expired, at the latest¹, 171 days later on
7 September 8, 2008². Because Petitioner did not file the instant federal
8 Petition until September 29, 2008³, this period of statutory tolling is
9 insufficient to make the Petition timely. Thus, unless Petitioner
10 establishes an entitlement to equitable tolling, the instant Petition is
11 untimely.

12 **2. Petitioner Fails to Show That Equitable Tolling Is Warranted**

13 Petitioner argues that he is entitled to equitable tolling because
14 he was held in the segregated housing unit from November 5, 2007 to
15 January 13, 2008, and this made it "impossible" to file a petition on
16 time. Pet'r Opp'n at 3.

17 In the Ninth Circuit, the AEDPA's one-year statute of limitations
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19 ¹ The Court assumes without deciding, for purposes of this calculation, that
20 194 days already had expired on the limitations period (relying on the July 22, 2007
mailing date for Petitioner's state habeas petition).

21 ² The 171st day actually is September 6, 2008. However, because that date
22 is a Saturday, the limitations period would not expire until the following Monday, in
accordance with Rule 6 of the Federal Rules of Civil Procedure. See Patterson v.
23 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (calculating AEDPA's one-year limitation
period according to Fed. R. Civ. P. 6(a)).

24 ³ Again, the Court considers whether Petitioner is entitled to the benefit
25 of the mailbox rule. He signed his federal petition on September 23, 2008. Doc. No.
1. However, the Petition is not accompanied by a proof of service indicating when
26 Petitioner presented it to prison authorities for mailing, so it appears the mailbox
rule does not apply. See Smith v. Duncan, 297 F.3d 809, 814-815 (9th Cir. 2002),
27 abrogated on other grounds by Pace v. DiGuqlielmo, 544 U.S. 408 (2005) (focusing on the
date the petitioner "signed the declaration of mailing"). The Court also does not need
28 to resolve this factual issue because, even if the Court allowed Petitioner the benefit
of the extra few days, the Petition still is untimely.

1 is subject to equitable tolling.⁴ See Harris v. Carter, 515 F.3d 1051,
2 1055 n.4 (9th Cir. 2008) (confirming the Ninth Circuit holding that
3 § 2244(d) allows for equitable tolling); Roy v. Lampert, 465 F.3d 964,
4 970 (9th Cir. 2006) (same). While equitable tolling is "unavailable in
5 most cases," Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999), it is
6 appropriate where a habeas petitioner demonstrates two specific
7 elements: "(1) that he has been pursuing his rights diligently, and
8 (2) that some extraordinary circumstance stood in his way," Pace v.
9 DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioners face such a high bar
10 so as to effectuate the "AEDPA's statutory purpose of encouraging prompt
11 filings in federal court in order to protect the federal system from
12 being forced to hear stale claims." Guillory v. Rose, 329 F.3d 1015,
13 1018 (9th Cir. 2003) (citing Carey v. Saffold, 536 U.S. 214, 226
14 (2002)).

15 In this case, Petitioner's equitable tolling argument is
16 unavailing. The statute of limitations already was tolled from
17 September 28, 2007 through March 19, 2008, while Petitioner's habeas
18 petition was pending in the California Supreme Court. See Section B(1)
19 *supra*. This time frame encompasses the time period from November 5,
20 2007 through January 13, 2008, during which Petitioner claims he was
21 held in the segregated housing unit. Thus, even if Petitioner's
22 allegations regarding being held in the segregated housing unit were

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27 ⁴ The Supreme Court has never squarely addressed the question of whether
28 § 2244(d) allows for equitable tolling of the AEDPA's statute of limitations. See
Lawrence v. Florida, 549 U.S. 327, 336 (2007) (assuming without deciding that equitable
tolling applies to the AEDPA's limitations period).

1 sufficient to warrant equitable tolling⁵, because the statute already was
2 statutorily tolled during that time, Petitioner would not benefit from
3 any equitable tolling during the November to January time frame. In
4 other words, he is not entitled to any additional period of tolling.

5 Petitioner does not present any other arguments or assert any other
6 facts in support of his equitable tolling claim and the Court sees none.
7 Accordingly and for the foregoing reasons, the Court finds that the
8 instant Petition was filed after the statute of limitations expired and
9 Petitioner has not satisfied his burden of demonstrating that equitable
10 tolling is appropriate in this case. See Gaston v. Palmer, 417 F.3d
11 1030, 1034 (9th Cir. 2005) (holding that the petitioner "bears the
12 burden of showing that equitable tolling is appropriate"). As a result,
13 this Court finds that the claims presented in the Petition are barred by
14 the AEDPA's one-year statute of limitations and, therefore, **RECOMMENDS**
15 that Respondent's Motion to Dismiss be **GRANTED**.

16 **CONCLUSION AND RECOMMENDATION**

17 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the Court
18 issue an Order: (1) approving and adopting this Report and
19 Recommendation; (2) granting Respondents' Motion to Dismiss; and
20 (3) dismissing this action in its entirety with prejudice.

21 **IT IS ORDERED** that no later than May 20, 2009, any party to this
22 action may file written objections with the Court and serve a copy on
23 all parties. The document should be captioned "Objections to Report and
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26 ⁵ In light of Petitioner's bare allegations, which do not specify which
27 petition he sought to file during this time period, why his housing situation made it
28 "impossible" to file said petition, or what efforts Petitioner made to comply with
court deadlines, the Court does not find that Petitioner has met the standard necessary
to justify equitable tolling. See Pace, 544 U.S. at 418 (requiring a showing of
diligence and extraordinary circumstances).

1 Recommendation."

2 **IT IS FURTHER ORDERED** that any reply to the objections shall be
3 filed with the Court and served on all parties no later than **June 10,**
4 **2009.** The parties are advised that failure to file objections within
5 the specified time may waive the right to raise those objections on
6 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455
7 (9th Cir. 1998).

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9 DATED: April 28, 2009



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11 BARBARA L. MAJOR
12 United States Magistrate Judge

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